IN THE

Supreme Court of the United States

No. 396

ROBERT F. BUGGS, Petitioner,

vs.

FORD MOTOR COMPANY, a Foreign Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

EDGAR B. TOLMAN, of Chicago, Ill.
Attorney for Petitioner Robert F. Buggs.

JACOB GEFFS, of Janesville, Wis.
Of Counsel.

SUBJECT INDEX

ATHORITIES CITED

CASES

TEXTS

STATUTES

IN THE

Supreme Court of the United States

No.....

ROBERT F. BUGGS, Petitioner,

vs.

FORD MOTOR COMPANY, a Foreign Corporation, Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Robert F. Buggs respectfully prays that a Writ of Certiorari issue to review a judment of the Circuit Court of Appeals for the Seventh Circuit, affirming the judgment of the District Court of the United States for the Western District of Wisconsin which judgment dismissed petitioner's action against the respondent.

Summary Statement of the Matter Involved.

Petitioner, a resident of Rock County, Wisconsin, began an action at law in the Circuit Court of that county against respondent to recover damages for the unlawful cancellation of a franchise or license to act as a Ford dealer in Janesville, Wisconsin and surrounding territory (R pages 12-17). The petitioner alleged that he had held a Ford dealer franchise in the above territory since October, 1913; that the franchise had been renewed from time to time; that he had equipped his garage to handle efficiently this agency and had expended $7,600 in building a warehouse necessary for the assembling of Ford cars; that he had purchased Ford parts, expended money and effort in building up Ford trade upon the assurance and belief that he would have a permanent business; that he had put in over twelve hours a day in the work and had expended over $100,000 in building up the business; that upon September 27, 1937 the respondent unlawfully and in violation of Section 218.01 of the Wisconsin Statutes cancelled his franchise and prayed for damages, compensatory and punitive, in the amount of $150,000 (R. pages 12-17).

The Statute above referred to became effective July 14, 1937 and provides, among other things, for the suspension of revocation of a license of a manufacturer "who has unfairly, without due regard to the equities of said dealer and without just provocation, cancelled the franchise of any motor vehicle dealer." (R. p. 120). A copy of the statute is attached hereto as Appendix A.

Upon the respondent's request the action was removed to the United States District Court for the Western District of Wisconsin. (R. pages 2-12)

The respondent answered alleging among other things

that the Statute was unconstitutional; that it was not applicable to the parties; and that the parties had entered into a Sales Agreement (R. pages 41-46) on May 26, 1932, which governed the rights of the parties. (R. pages 17-25)

The petitioner replied admitting the execution of the Sales Agreement but denying its validity on the ground that it lacked mutuality. (R. Pages 49-54)

On the respondent's motion the District Court dismissed petitioner's action and held that the Sales Agreement was a valid contract and governed the rights of the parties (R. Pages 98-107). The petitioner appealed to the Circuit Court of Appeals for the Seventh Circuit, and that court affirmed the judgment of the District Court. (R. Pages 120-126)

Reasons Relied on for the Allowance of the Writ.

A.

The decision of the Circuit Court of Appeals in holding that a sales agreement which gives the respondent (the seller) the power to fix the price to be paid by the petitioner (the buyer) is a valid contract is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit on the same matter, in the case of *Ford Motor Company* vs. *Kirkmyer Motor Company*, 65F. (2d) 1001.

B.

The decision of the Circuit Court of Appeals in holding that a sales agreement which gives the seller the arbitrary power to fix and change prices at will, is a valid contract, is a decision of an important question of local law and is in conflict with applicable local decisions.

C.

The decision of the said Circuit Court of Appeals is untenable and in conflict with the authorities.

THEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Seventh Circuit, commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in this case; that the judgment of said court may be reversed, and that your petitioner have such other and further relief in the premises as to your Honorable Court may seem meet and proper.

EDGAR B. TOLMAN of Chicago, Ill.
Attorney for Petitioner

JACOB GEFFS of Janesville, Wis.
Of Counsel

PETITI

BR

ONER'S

IEF

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Opinion Below.

The opinion in the Circuit Court of Appeals (R. Pages 120-125) is reported in (not yet published in official reporter).

II.

JURISDICTION

Jurisdiction of this court is invoked under Section 240 (A) of the Judicial Code, as amended, by the Act of February 13, 1925, (28 U.S.C.A. 347), and Section 262 of the Judicial Code (28 U.S.C.A. 377).

The judgment of the Circuit Court of Appeals affirming the judgment below was entered June 28, 1940.

III.

STATEMENT OF THE CASE

A sufficient statement of the case is included in the petition.

IV.

Specification of Error Intended to Be Urged.

1. The Circuit Court of Appeals erred in affirming the judgment below.

V.

ARGUMENT

1. THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT IS IN CONFLICT WITH THE DECISION OF THE CIRCUIT COURT OF APPEALS FOR

THE FOURTH CIRCUIT, ON THE SAME MATTER, IN THE CASE OF *FORD MOTOR COMPANY* VS. *KIRKMYER MOTOR COMPANY*. 65F (2d) 1001.

2. THE DECISION IS IN CONFLICT WITH LOCAL LAW AND IN CONFLICT WITH LOCAL DECISIONS.

3. THE DECISION IS UNTENABLE AND IN CONFLICT WITH THE AUTHORITIES.

This case involves the rights of Wisconsin automobile dealers under Chapter 218 of the Wisconsin Statutes, which we have set forth in Appendix A. The purpose of the Statute was and is to protect the business and investment of Wisconsin citizens from being arbitrarily destroyed by the manufacturer. The Statute became effective July 14, 1937, and was applicable to the parties at the time the petitioner's cause of action arose; namely, the date of the attempted cancellation of his franchise, on September 27, 1937. This stands admitted on the record. The petitioner alleges in paragraph 2 of his complaint (R. pages 12-13) that he is a licensed automobile dealer under Chapter 218 of the Wisconsin Statutes and has been since January 10, 1936. The respondent admits in its answer that "it (the respondent) has duly complied with Chapter 218 of the Wisconsin Statutes for 1937." (R. Pages 17-18). The question before the court below was: Did the wilful violation of a positive statutory duty by the respondent, which resulted in damage to the petitioner, a member of a class intended to be protected by the Statute, give rise to a civil action for damages? The petitioner contended that it did under the authorities of *Texas & N.O.R. Co. et al. v. Brotherhood of Railway and Steamship Clerks*, 281 U.S. 548, 50 S. Ct. 427; *Couch*

v. Steel, 3 El. & Bl. 402, 118 E.R. 1193 (1854); and *Judenine v. Benzies—Montanye Fuel & Warehouse Co.*, 222 Wis. 512, 269 N.W. 295, 106 A.L.R. 1443.

The decision below does not dispute this proposition of law, but denies the petitioner the protection of the Statute on the ground that the Statute was circumvented by the Sales Agreement signed in 1932. On page 125 of the Record the court below stated:

> "We are convinced that the legislation did not intend to make its legislation, nor did the legislation, by its own terms, apply to and include existing contracts."

In other words the public policy established by the Statute of Wisconsin is circumvented by prior Sales Agreement, (R. pages 41-46), identical in effect to one which the Circuit Court of Appeals for the Fourth Circuit in the case of *Ford Motor Company v. Kirkmyer Motor Co.* 65 F. (2d) 1001, declared to be a nullity for lack of mutuality. Furthermore, as above pointed out, it is admitted by the Record that this Statute was applicable to both parties *at the time of the alleged wrongful act* on the part of the respondent.

The first proposition that the decision below is in conflict with the law as established by the Fourth Circuit Court of Appeals in the case of *Ford Motor Company v. Kirkmyer Motor Company*, 65 F. (2d) 1001 is admitted by the court below. On pages 123-125 of the Record the court stated:

The legal questions are:

1. Is the Wisconsin statute (Wis. Stats. 218.01 (3) (17)) valid? Is it retroactive?

2. Is one aggrieved by the inexcusable cancellation of

his dealer's contract entitled to maintain an action for damages because of this statute which provides for cancellation of the manufacturer's right to do business in the State of Wisconsin in case it inexcusably and unjustifiably cancels a dealer's agreement?

3. Was the last written agreement between plaintiff and defendant invalid because unilateral?

4. If invalid, were there valid contractual obligations binding on the parties on September 22, 1937, which made applicable the aforesaid Wisconsin statute?

Most sharply controverted is the question of the validity of the contract. Plaintiff contends that it lacks mutuality. In short, it is unilateral.

An examination of its terms, which are many, indicates that it was dictated by the manufacturer at Detroit, and drawn by its counsel with the avowed purpose of protecting the manufacturer to the utmost and granting, if any, few rights to, and the smallest possible protection of, the agent.

It is one which affords some support for the wisdom and the necessity of legislation which protects the weak against a strong party in situations like the instant one. The terms of this and other similar agreements had, no doubt, a casual bearing upon the passage of the legislation which the State of Wisconsin enacted in 1937. It cannot be ignored in considering the validity of such legislation.

Similar contracts have been before the courts on many occasions, and there are numerous decisions, entitled to weight and respect, which hold these contracts to be void for lack of mutuality. The case which most strongly supports plaintiff's position is Ford Motor Company v. *Kirkmyer Motor Co.*, 65 F. (2d) 1001, a decision by the Circuit Court of Appeals of the Fourth Circuit. This

decision in turn relies on *Huffman* v. *Page-Detroit Motor Car Co.*, 262 Fed. 116. Likewise, two decisions of this court, *Velie Co.* v. *Kopmeier Co.*, 194 Fed. 324, and *Oakland Motor Car Co.* v. *Indiana Auto. Co.*, 201 Fed. 498, join in condemning agreements which are loaded with express obligations of one side and silent as to the obligations of the manufacturer. *Jordan* v. *Buick Co.*, 75 F. (2d) 447, is another case (by this court) which followed the above-cited cases, and found the agreement there set forth to lack mutuality. Cited below are many cases which contain discussions of this question.*

Such disagreement as seemingly exists in the decisions may be partly attributed to the differences in the terms of the agreements under attack.

We are convinced that the agreement before us is not unilateral and is valid.

Going at once to the most important paragraphs of the contract and the ones upon which defendant must chiefly rely to support its contention that the agreement is valid, we find the following:

"(1) Company agrees to sell and Dealer agrees to purchase Ford automobiles, * * * accessories and parts (hreinafter sometimes collectively referred to as Company's 'Products') upon the terms, conditions and provisions hereinafter specifically set forth and subject to the right reserved to Company to sell to other Dealers and direct to retail purchasers in any part of the United States without obligations for any commission to Dealer on any such sale.

"(2) Company will sell its products to Dealer f.o.b. Detroit, Michigan, at such net list price, or at such discounts from published list prices as are from time to time fixed by Company. * * *

"* * *

"(5) 'List Prices' of all Ford products shall be subject to change at any time and from time to time without obligation on Company to adjust with Dealer as to price of any product shipped, or paid for but not in transit, at the time such price change becomes effective.

"* * *

* *Chevrolet Motor Co.* v. *McCullough Co.*, 6 F.-(2d) 212; *Freiburger* v. *Texas Co.*, 257 N. W. 592 (Wis.); *Erskine* v. *Chevrolet Motor Co.*, 185 N. C. 479; *Bendix* v. *Staver Co.*, 174 Ill. App. 589; *Chevrolet Co.* v. *Gladding*, 42 F. (2d) 440; 32 A. L. R. 209; *Ken-Rad Corp.* v. *Bohannan*, 80 F. (2d) 251; Casae Note, 45 Harvard Law Review, page 378; Williston on Contracts, Sec. 1027 A; *Bliss Furn. Co.* v. *Norris*, 129 Mich. 11, 87 N. W. 1041; *Wilkinson* v. *Heavenrich*, 58 Mich. 574, 26 N. W. 139; *Bastian* v. *J. H. D. P. Co.* 261 Mich. 94, 245 N. W. 581; *Motor Car Supply Co.* v. *Gen. Household Utilities Co.*, 80 F. (2d) 167, 170; *Brooks* v. *Fed. Surety Co.*, 24 F. (2d) 884, 57 A. L. R. 745; *E. I. Du Pont Co.* v. *Claiborne-Reno*, 64 F. (2d) 224; *Ellis* v. *Dodge Bros.*, 246 Fed. 764.

"(9) It is further mutually agreed that:

"Estimates

"(a) Dealer will furnish Company on Company forms, prior to December 31st of each year, an estimate of the number of Ford automobiles, trucks, cabs and chassis that Dealer will purchase from Company during each month of the succeeding year. Company agrees to give careful consideration to such estimates, but expressly reserves the right to follow or depart from such estimates according to its discretion. Company shall in no way be liable for any delay in shipments, however caused, nor for shipments over other than specified route.

"* * *

"(c) This agreement may be terminated at any time at the will of either party by written notice to the other party given either by registered mail or by personal delivery, and such termination shall also operate to cancel all orders theretofore received by Company and not delivered.

"* * *

"(e) This is a Michigan Agreement and shall be con-

strued according to the laws of the State of Michigan. If any provision of this agreement is held to be invalid or unenforceable, this contract shall as to such provision be considered divisible and the balance of the agreement shall be valid and binding."

For appellant it is contended that the agreement to sell does not definitely specify the prices at which the product would be sold. Moreover, he argues that the contract was terminable at any time.

Vital and determinative are paragraphs 1 and 2. The first obligates defendant to sell, but upon "terms, conditions and provisions hereinafter specifically set forth." These conditions and terms are set forth in paragraph 2, which provides defendant "will sell its products to plaintiff f.o.b. Detroit, Michigan at such net list price, or at such discounts from published list prices as are from time to time fixed by Company." This seems, under the authorities and on reason, sufficiently definite.

The parties had been dealing with each other prior to the execution of the last contract. They knew of the practices of each other. The dealer knew that automobiles were redesigned and new models appeared yearly and as a result prices changed at least seasonally. Defendant's business was nationwide and its agents were many. It was to this known situation that the conract referred. The parties negotiated with a background of past dealings and mutual knowledge of the practices of the trade. "The net list prices and discounts from published list prices" appearing in paragraph 2 were well known to both parties. These net list prices and published list prices were the same to all dealers. They changed as necessity required. They were not lacking in definiteness, but provided a method whereby the prices could be definitely ascertained at any time.*

Having reached the conclusion that the agreement was valid and binding and therefore subject to cancellation by either party upon the giving of written notice, the only remaining question is the effect of the Wisconsin statute upon such an existing contract.

We are convinced that the legislature did not intend to make its legislation, nor did the legislation, by its own terms, apply to and include existing contracts. We must give to it a construction which will avoid a successful attack on its unconstitutionality. Our conclusion is, therefore, that the Wisconsin statute in question did not apply to, or effec, exisitng valid contracts such as the one here in question.

It becomes unnecessary for us to consider the two other difficult and vexatious questions which appellant has raised.

The judgment is

AFFIRMED.

• *Ken-Rad Corp.* v. *Bohannan*, 80 F. (2d) 251; *Memphis Furniture Co.* v. *Wemyss Co.*, 2 F. (2d) 428; *Moore v. Shell Oil Co.*, 2 Pac. (2d) 216; *Moon Motor Car Co.* v. *Moon Motor Car, Inc.*, 29 F. (2d) 3.

(Italics ours)

An examination of the decision of the Circuit Court of Appeals for the Fourth Circuit in the case of *Ford Motor Company* vs. *Kirkmyer Motor Company*. 65F. (2d) 1001 reveals that exactly the same Sales Agreement was involved and the court reached exactly the opposite conclusion from the decision at bar. The question is: Is a Sales Agreement valid which gives the manufacturer sole authority to fix the price, to change it at any time, and which confers no legally enforceable right on the dealer? We contend that it is void for lack mutuality. The decisions of the Circuit Court of Appeals are in conflict on this question.

We contend further that the question is one of vital importance. It is more than a mere conflict of views on a particular set of facts. If the decision below stands it means (1) that agents and dealers, regardless of their equities, can be held to unconscionable contracts which in the words of the court below are

> "dictated by the manufacturer at Detroit, and drawn by its counsel with the avowed purpose of protecting the manufacturer to the utmost and granting, if any, few rights to, and the smallest possible protection of, the agent"

and (2) that such contracts may circumvent and defeat legislation directed at the correction of such abuses.

The Sales Agreement (R. pages 41-46) under consideration is declared by its terms to be a Michigan contract and governed by the laws of Michigan (R. page 45). We contend that the decision below is in conflict with the Michigan decisions.

Wordell vs. Williams (1886) 62 Mich. 50, 28 N. W. 796 at page 800:

> "It has been said that a *mere promise* to do an act in future is a sufficient consideration, even without performance, for an engagement by the other party. But the true principle underlying such doctrine is that the promise which forms the consideration will subject the party making it to a charge or obligation which he otherwise would not have incurred. By making it he must have incurred a liability to the party to whom it is made, in case he refuses to perform, for which such other party may have an action for damages. How otherwise can such promise amount to a consideration for the promise or agreement of the other party? A promise that cannot be

enforced either at law or in equity is a mere nudum pactum. * * *"

Bastian vs. J. H. DuPrey Company (1932) 261 Mich. 94, 245 N. W. 581, at page 581 of the N. W. Reporter:

"There is no question but in order to constitute a valid contract there must be mutuality of obligation. * * *"

We contend that the decision in question repudiates the law of consideration in contracts, and for that reason is untenable and contrary to the established authorities in this country.

RESTATEMENT OF CONTRACTS Sec. 32

"An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promise and performances to be rendered by each party are reasonably certain.

Comment:

* * * The law cannot subject a person to a contractual duty or give another a contractural right unless the character thereof is fixed by the agreement of the parties. A statement by A that he will pay B what A chooses is no promise. * * *"

Brooks vs. Federal Surety Co. (App. D. C. 1928), 24 F. (2d) 884, 57 A. L. R. 745.

This case involved an agreement to furnish coal at the price the plaintiff should sell it for less 10 per cent. The Court said the agreement in effect was a sale of coal to the plaintiffs "leaving it to them alone to determine the price to be paid for it." The court held the agreement void for lack of mutuality saying:

"Such an agreement lacks mutuality, and cannot be enforced.

"In Foster vs. Lumbermen's Min. Co., 68 Mich. 188, 36 N. W. 171, the court says: 'An agreement for the sale of a quantity of iron ore, for a price per ton dependent upon that received by the vendee on its sale, lacks an essential ingredient of a contract of sale, and cannot be enforced.'

"In Weston Paper Mfg. Co. vs. Downing Box Co., 293 Fed. 725, it is held by the Circuit Court of Appeals, Seventh Circuit, that a contract for the sale of a large quantity of strawboard, to be delivered in monthly installments throughout a year, which authorized seller to fix the price for each three months' deliveries in advance, though it provided that such price 'shall be the seller's market price then existing,' is too indefinite to constitute a valid contract enforceable against the buyer. The court said:

'Plaintiff asserts, and the defendant denies, the validity of a sales agreement where the "market price" is determined, as here, by the seller. In fact it is urged that such a provision is not a "market price" in any proper sense of the term, *but is the seller's price, and brings the case squarely within the rule, announced in many cases, to the effect that an agreement which leaves the price to be fixed by the seller is too indefinite to be enforced and is void.* Williston, Sales §§ 37, 43, 464; Cold Blast Transp. Co. vs. Kansas City Bolt & Nut Co., 57 L. R. A. 696, 52 C. C. A. 25, 114 Fed. 77; American Cotton Oil Co. vs. Kirk, 15 C. C. A. 540, 34 U. S. App. 60, 68 Fed. 791; Crane vs. C. Crane & Co., 45 C. C. A. 96, 105 Fed. 869; United Press vs. New York Press Co., 164 N. Y. 406, 53 L. R. A. 288, 58 N. E. 527; Hoffman vs. Maffioli, 104 Wis. 630, 47 L. R. A. 427, 80 N. W. 1032; Joliet Bottling Co. vs. Joliet Citizens' Brewing Co., 254 Ill. 215, 98 N. E. 263; Velie Motor Car Co. vs. Kopmeier Motor Car Co., 114 C. C. A 284, 194 Fed. 324.

'Plaintiff, contending that the contract should be construed, if possible, so as to uphold it, insists that

it is neither unilateral nor uncertain, but governed by he maxim "id certum est quod certum reddi potest." * * * While so recognizing the rule for which plaintiff contends, we are unable to apply it to the facts in this case. We see nothing in this contract which takes from the seller the absolute right to fix the price in the future. Certainly defendant had no voice in fixing his price. Nor did any third party have any immediate influence upon plaintiff in determining the price. True, plaintiff may, in acting, have been governed by a desire to hold future business, or have been prompted by other laudable motives. But plaintiff could have arbitrarily changed the price each quarter, and from such arbitrary fixation defendant had no appeal. Upon the ground of uncertainty, and also for want of consideration, we conclude the agreement as drawn was unenforceable.'

"The contract in the instant case does not stipulate that the price of the coal shall be governed by the market price thereof, and the court cannot import such a provision into the contract. It is true that the plainiffs would not be permitted to make fraudulent sales for price-fixing purposes, but that rule cannot take the place of an agreement of the parties in regard to price.

"We need not refer to the numerous authorities cited by the parties, all of which have been examined by us, for we are convinced that the judgment of the lower court was right" (Italics ours).

Corthell vs. Summitt Thread Co. (1933), 132 Me. 94, 167 Atl. 79, 92 A. L. R. 1391 at page 1394 of A. L. R.

"If the contract makes no statement as to the price to be paid, the law invokes the standard of reasonableness, and the fair value of the services or property is recoverable. If the terms of the agreement are uncertain as to price, *but exclude the supposition*

> *that a reasonable price was intended, no contract can arise.* And a reservation to either party of an unlimited right to determine the nature and extent of his performance renders his obligation too indefinite for legal enforcement, making it as it is termed, merely illusory" (Italics ours).

The decision in question is contrary to the principles enunciated by the Circuit Court of Appeals for the Fourth Circuit in the case of *Motor Car Supply Company vs. General Household Utilities Company* 80 F. (2d) 167. On page 170 of the Federal Reporter the court states:

> "As the plaintiff was not bound to make deliveries under the contract, therefore, it was void for lack of mutuality in so far as it provided for future sale or purchase. The law is well settled that, where a contract for the future delivery of personal property confers upon either party an arbitrary right of cancellation prior to delivery, it is lacking in mutuality and will be held binding upon the parties only to the extent that it has been performed. (Citing Cases) and, with respect to distributor's contracts, like that here under consideration, it is equally well settled that such a contract, which does not bind the manufacturer to sell and deliver, and which is terminable at will, imposes no liability upon him if he terminates it or refuses to make deliveries to the dealer. Ford Motor Co. vs. Kirkmeyer Motor Co., supra (65 Fed (2d) 1001) Jordan vs. Buick Motor Co. (C. C. A. 7th) 75 F. (2d) 447; * * *"

We contend that the decision is untenable and against public policy. Both parties to a contract should be bound or neither should be bound. It is against public policy to allow a manufacturer to sign up dealers on an agreement which places great and severe obligations on the dealers, but none on the manufacturer. The decision be-

low states that this was the avowed purpose of the respondent in drawing up the Sales Agreement under consideration. The decision below in effect holds that such an agreement deprives the petitioner of the protection of Section 218.01 of the Wisconsin Statutes which he otherwise would have.

For the reasons stated, it is submitted that the writ should be granted in this case.

Respectfully submitted,

EDGAR B. TOLMAN,
of Chicago, Illinois.
Attorney for the Petitioner,
ROBERT F. BUGGS.

JACOB GEFFS,
Janesville, Wisconsin
Of Counsel.

APPENDIX A

218.01 Motor vehicle dealers; salesmen; sales finance companies, licenses; fees; regulations: coercion; subsidies; penalties. (1) Definitions. In this section, unless the context otherwise requires, the following words and terms shall have the following meanings:

(a) "Motor vehicle dealer" means any person, firm or corporation, not excluded by paragraph (b) of this subsection who:

1. For commission, money or other thing of value, sells, exchanges, buys or rents; or offers or attempts to negotiate a sale or exchange of an interest in motor vehicles; or,

2. Who is engaged wholly or in part in the business of selling motor vehicles whether or not such motor vehicles are owned by such person, firm or corporation.

(b) The term "motor vehicle dealer" does not include:

1. Receivers, trustees, administrators, executors, guardians or other persons appointed by or acting under the judgment or order of any court; or

2. Public officers while performing their official duties; or

3. Employes of persons, corporations or associations enumerated in subdivisions 1 and 2 of this paragraph, when engaged in the specific performance of their duties as such employes.

(c) "Motor vehicle salesman" means any person who

is employed as a salesman by a motor vehicle dealer to sell motor vehicles.

(d) "Sales finance company" means and includes any person, firm or corporation engaging in this state in the business, in whole or in part, of acquiring by purchase or by loan on the security thereof, or otherwise, retail instalment contracts from retail sellers in this state, including any motor vehicle dealer who shall carry or retain for more than thirty days any retail instalment contracts acquired by him in his retail sales of motor vehicles.

(e) "Retail instalment contract" or "instalment contract" means and includes every contract to sell one or more motor vehicles at retail, in which the price thereof is payable in one or more instalments over a period of time and in which the seller has either retained title to the goods or has taken or retained a security interest in the goods under a form of contract designated either as a conditional sale, chattel mortgage or otherwise.

(f) "Retail seller" means a person, firm or corporation selling or agreeing to sell one or more motor vehicles under a retail instalment contract to a buyer for the latter's personal use or consumption thereof.

(g) "Retail buyer" means a person, firm or corporation buying or agreeing to buy one or more motor vehicles from a retail seller under a retail instalment contract.

(h) "Cash price" means the retail seller's price in dollars for the sale of the goods, and the transfer of unqualified title thereto, upon payment of such price in cash or the equivalent thereof.

(i) "Finance charge" means that part of the total price in the retail instalment contract of sale in excess of the case price, and includes, unless otherwise specified, the insurance premium, if any.

(j) The term "commission" means the state banking

commission and including any member or members thereof or any duly authorized deputy named or appointed by such commission to perform any function in the administration or enforcement of this section.

(k) "Motor vehicle" means any motor driven vehicle required to be registered under section 85.01.

(l) "Manufacturer" means any person resident or nonresident in this state who manufactures or assembles motor vehicles in this state.

(a) "Distributor" or "wholesaler" means a person resident or non-resident i n this state, who in whole or part, sells or distributes motor vehicles to motor vehicle dealers in this state, or who maintains distributor representatives in this state.

(n) "Factory branch" means a branch office maintained in this state, by a person who manufactures or assembles motor vehicles, for the sale of motor vehicles to distributors, or for the sale of motor vehicles to motor vehicle dealers or for directing or supervising in whole or part, its representatives in this state.

(o) "Distributor branch" means a branch office similarly maintained by a distributor or wholesaler for the same purposes.

(p) "Factory representative" means a representative employed by a person who manufactures or assmbles motor vehicles or by a factory branch, for the purpose of making or promoting the sale of its motor vehicles, or for supervising or contacting its dealers or prospective dealers.

(q) "Distributor representative" means a representative similarly employed by a distributor, distributor branch, or wholesaler.

(r) "Person" means a person, firm, corporation or association.

(2) Licenses, How Granted. (a) No motor vehicle dealer, motor vehicle salesman, or sales finance company shall engage in business as such in this state without a license therefor as provided in this section. If any motor vehicle dealer acts as a motor vehicle salesman he shall secure a motor vehicle salesman's license in addition to a license for motor vehicle dealer.

(am) No manufacturer of motor vehicles, or factory branch, or distributor or distributor branch shall engage in business as such in this state without a license therefor as provided in this section.

(an) No factory representative or distributor representative shall engage in business as such in this state without a license therefor as provided in this section.

(2) (b) Application for license shall be made to the commission, at such time, in such form and contain such information as the commission shall require and shall be aaccompanied by the required fee. *The commission may require in such application, or otherwise, information relating to the applicant's solvency, his financial standing or other pertinent matter commensurate with the safeguarding of the public interest in the locality in which said applicant proposes to engage in business, all of which may be considered by said commission in determining the fitness of said applicant to engage in business as set forth in this section.*

(c) All licenses shall be granted or refused within thirty days after application therefor, and shall expire, unless sooner revoked or suspended, on December thirty-first of the calendar year for which they are granted.

(d) The license fee for each calendar year, or part thereof, shall be as follows, effective January 1, 1938:

1. For motor vehicle dealers, five dollars for each office or branch or agent thereof, plus one dollar for a supplemental license for each used car lot not immediatly adjacent to the office or to a branch.

2. For motor vehicle manufacturers, five dollars; and for each factory branch in this state, five dollars.

3. For distributors or wholesalers, the same as for dealers.

4. Any person licensed under subdivision 2 or 3 next preceding, may also operate as a motor vehicle dealer, without any additional fee or license.

5. For motor vehicle salesmen, two dollars.

6. For factory representative, or distributor branch representative, two dollars.

7. For sales finance companies on the basis of the gross volume of purchases of retail sales contracts of motor vehicles sold in this state for the twelve months immediately preceding October thirty-first of the year in which the application for license is made, as follows: On a gross volume of twenty-five thousand dollars or less, twenty-five dollars; on a gross volume of over twenty-five thousand and not over one hundred thousand dollars, fifty dollars; on each one hundred thousand dollars over one hundred thousand dollars and up to five hundred thousand dollars, an additional fifteen dollars; on each one hundred thousand dolars over five hundred thousand dollars and up to one million dollars, an additional ten dollars; and on each one hundred thousand dollars over one million dollars, an additional five dollars. No extra charge shall be made for branch licenses for sales finance companies. Gross voluae shall be based on the unpaid balance of the retail contracts.

8. For motor vehicle dealers, who operate as a sales finance company, the same as sales finance companies, except for the first five thousand dollars of gross volume, no fees; on each one thousand dollars of gross volume, or part thereof, over five thousand dollars and up to twenty-five thousand dollars one dollar.

(e) The licenses of dealers, manufacturers, factory branches, distributors, distributor branches and sales finance companies shall specify the location of the office or branch and must be conspicuously displayed there. In case such location be changed, the commission shall endorse the change of location on the license without charge if it be within the same municipality. A change of location to another municipality shall require a new license, except for sales finance companies.

(f) Every salesman, factory representative or distributor representative shall carry his license when engaged in his business, and display the same upon request. The license shall name his employer, and in case of a change of employer, the salesman shall immediately mail his license to the commission who shall endorse such change on the license without charge.

(g) Every sales finance company shall be required to procure a salesman's license for itself or its employes in order to sell motor vehicles repossessed by it.

(h) The commission may require any licensee to furnish and maintain a bond in such form, amount and with such sureties as it shall approve, but not in excess of five thousand dollars, conditioned upon such licensee complying with the provisions of this section and the lawful orders of the commission hereunder.

(i) Application for dealers' or finance companies' licenses shall be in duplicate and shall contain such information as the secretary of state may require under

chapter 85. The commission, upon granting a license to a dealer or finance company, shall promptly certify that fact to the secretary of state on the duplicate application filed; and no motor vehicle dealer or sales finance company, unless so licensed, shall be permitted to register or receive or use license plates under section 85.02. Any sales finance company licensed hereunder shall have all the rights accorded to and be liable to all the penalties imposed on motor vehicle dealers under section 85.02.

(3) Licenses, How Denied, Suspended or Revoked. (a) A license may be denied, suspended or revoked on the following grounds:

1. Proof of unfitness of applicant.
2. Material misstatement in application for license.
3. Filing a materially false or fraudulent income tax return as certified by the tax commission.
4. Wilful failure to comply with any provision of this section or any rule or regulation promulgated by the commission under this section.
5. Wilfully defrauding any retail buyer to the buyer's damage.
6. Wilful failure to perform any written agreement with any retail buyer.
7. Failure or refusal to furnish and keep in force any bond required.
8. Having made a fraudulent sale, transaction or repossession.
9. Fraudulent misrepresentation, circumvention or concealment through whatsoever subterfuge or device of any of the material particulars or the nature thereof required hereunder to be stated or furnished to the retail buyer.
10. Employment of fraudulent devices, methods or

practices in connection with aompliance with the requirements under the statutes of this state with respect to the retaking of goods under retail instalment contracts and the redemption and resale of such goods.

11. Having indulged in any unconscionable practice relating to said business.

12. Having charged interest in excess of fifteen per cent per annum.

13. Having sold a retail instalment contract in this state to a sales finance company not licensed hereunder.

14. Having violated any law relating to the sale, distribution or financing of motor vehicles.

15. Being a manufacturer of motor vehicles, factory branch, distributor, field representative, officer, agent or any representative whatsoever of such motor vehicle manufacturer or factory branch, who has induced or coerced or attempted to induce or coerce any automobile dealer to accept delivery of any motor vehicle or vehicles, parts or accessories therefor, or any other commodities which shall not have been ordered by said dealer.

16. Being a manufacturer of motor vehicles, factory branch, distributor, field representative, officer, agent, or any representative whatsoever of such motor vehicle manufacturer or factory branch, who has attempted to induce or coerce, or has induced or coerced, any automobile dealer to enter into any agreement with such manufacturer, factory branch or representative thereof, or to do any other act unfair to said dealer, by threatening to cancel any franchise existing between such manufacturer, factory branch, or representative thereof and said dealer.

17. Being a manufacturer, factory branch, distributor, field representative, officer, agent, or any representative whatsoever of such motor vehicle manufacturer or factory branch, who has unfairly, without due regard to the equities of said dealer and without just provocation, cancelled the franchise of any motor vehicle dealer.

(b) The commission may without notice deny the application for a license within thirty days after receipt thereof by written notice to the applicant, stating the grounds for such denial. Upon request by the applicant, whose license has been so denied, the commission shall set the time and place of hearing a review of such denial, the same to be heard with reasonable promptness.

(c) No license shall be suspended or revoked except after a hearing thereon. The commission shall give the licensee at least five days' notice of the time and place of such hearing. The order suspending or revoking such license shall not be effective until after ten days' written notice thereof to the licensee, after such hearing has been had; except that the commission, when in its opinion the best interest of the public or the trade demands it, may suspend a license upon not less than twenty-four hours notice of hearing and with not less than twenty-four hours notice of the suspension of the license.

(d) The commission may inspect the pertinent books, records, letters and contracts of a licensee relating to any written complaint made to it against such licensee. If such licensee is found guilty of violating this section or any lawful order of the commission, the actual cost of each such examination shall be paid by such licensee so examined within thirty days after demand therefor by the commission, and the commission may maintain an

action for the recovery of such costs in any court of competent jurisdiction.

(e) If a licensee is a firm or corporation, it shall be sufficient cause for the denial, suspension or revocation of a license that any officer, director or trustee of the firm or corporation, or any member in case of a partnership, has been guilty of any act or omission which would be cause for refusing, suspending or revoking a license to such party as an individual. Each licensee shall be responsible for the acts of any or all of his salesmen while acting as his agent, if such licensee approved of or had knowledge of said acts or other similar acts and after such approval or knowledge retained the benefit, proceeds, profits or advantages accruing from said acts or otherwise ratified said acts.

(f) Any licensee or other person in interest being dissatisfied with an order of the commission may commence an action in the circuit court for Dane county against the commission as defendant to vacate and set aside such order on the ground that such order is unlawful or unreasonable. In any such action the complaint shall be served with the summons.

(g) The provisions of sections 214.08, 214.09, 214.11, 196.35, 196.36 and 196.42 to 196.47, as far as applicable, shall apply to appeals from the orders of the commission, and shall apply to hearings before the commission until such time as the commission shall establish its rules and regulations as to such hearings.

(4) Advisory Committee. The commission may appoint annually one or more local advisory committees and one general advisory committee, each consisting of not more than nine members. The committees upon request of the commission may advise and assist the commission in the administration of this section. The mem-

bers of said committees shall receive no compensation for their services or expenses.

(5) Rules and Regulations. (a) The banking commission shall promote the interests of the retail buyers of motor vehicles. It shall have power to define unfair practices in the motor vehicle industry and trade between licensees or between any licensees and retail buyers of motor vehicles.

(b) The commission shall have the power in hearings and trials arising under this section to determine the place, in the state of Wisconsin, where they shall be held; to subpoena witnesses; to take depositions of witnesses residing without the state, in the manner provided for in civil actons in courts of record; to pay such witnesses the fees and mileage for their attendance as is provided for witnesses in civil actions in courts of record; and to administer oaths. Whenever a hearing or trial shall be held by a member of the commission or by an examiner, he shall report his findings in writing to the entire commission, which shall thereupon make its rulings and orders.

(c) The commission may make such rules and regulations as it shall deem necessary or proper for the effective administration and enforcement of this section, the same to be effective when published at least once in the official state paper, but no licensee shall be subject to examination or audit by the commission except as provided in paragraph (d) of subsection (3) of this section.

(6) Instalment Sales. (a) Every retail instalment sale shall be evidenced by an instrument in writing, which shall contain all the agreements of the parties and shall be signed by the buyer.

(b) Prior to or concurrent with any instalment sale, the seller shall deliver to the buyer a written statement

describing clearly the motor vehicle sold to the buyer, the cash sale price thereof, the cash paid down by the buyer, the amount credited the buyer for any trade-in and a description thereof, the amount of the finance charge, the amount of any other charge specifying its purpose, the net balance due from the buyer, the terms of the payment of such net balance and a summary of any insurance coverage to be effected. The commission may determine the form of such statement to be included therein. In the event that a written order is taken from a prospective purchaser in connection with any such instalment sale, then shall the written statement above provided for be given to such purchaser prior to or concurrent with the signing of such order by such purchaser.

(c) Prior to five days after completion of any instalment sale, the seller shall mail or deliver to the buyer a true and complete copy of the instalment sale contract and any note or notes given in connection therewith.

(d) A violation of paragraphs (a) or (b) of this subsection shall bar recovery of any finance charge or any interest on the deferred balance by the seller, or an assignee of the seller who, at the time of the assignment, had knowledge of such violation, in any suit upon a sales contract arising from the sale where such violation occurred.

(e) Prior to thirty days after acquisition of any retail instalment contract from a retail seller, every finance company shall mail or deliver to the retail buyer a notice in writing that it has acquired the retail instalment contract from the retail seller thereunder, and shall also mail or cause to be mailed therewith a statement of the particulars of the retail instalment contract price, hereinbefore required to be stated by the retail seller, in accordance with the finance company's records respecting such

particulars, including the amount of the finance charge, which may include the cost of insurance, if any. Every finance company, if insurance is provided by it, shall also within the time stated send or cause to be sent to the retail buyer a policy or policies or certificate of insurance clearly setting forth the exact nature of the insurance coverage and the amount of the premiums which shall not exceed the rates as fixed in the published manual of a recognized standard rating bureau included in the finance charge, if such type of insurance be listed.

(em) In event the dealer shall finance the instalment sale contract, the commission may permit him to combine the information required by paragraphs (b) and (e) last above in one statement under such rules and regulations as the commission may from time to time prescribe.

(f) Any retail buyer of a motor vehicle, resident in the state of Wisconsin, at the time of purchase, under a retail instalment contract, shall have a valid defense in any action or proceeding at law to enforce said contract by any finance company not licensed hereunder which has purchased or otherwise acquired such contract, if such finance company has wilfully failed or refused to comply with paragraph (e) of this subsection.

(g) Any retail buyer of a motor vehicle resident of the state of Wisconsin at the time of the purchase thereof, under a retail instalment contract made in this state, shall have a valid defense against the recovery of the principal, finance charges, interest and other fees included in such contract, in any action or proceeding at law to enforce said contract by any person, firm or corporation who has purchased or otherwise acquired said contract, if such person, firm or corporation has failed or refused prior to such purchase or acquisition to be licensed as a sales fi-

nance company under the provisions of this section, and such person, firm or corporation is actually engaged, in this state, in business, in whole or in part as a sales finance company as defined in this section.

(h) No licensee shall charge interest in excess of fifteen per cent per annum.

(7) Prohibited Acts. (a No manufacturer of motor vehicles, no wholesaler or distributor of motor vehicles, and no officer, agent or representative of either shall induce or coerce, or attempt to induce or coerce, any retail motor vehicle dealer or prospective retail motor vehicle dealer in this state to sell, assign or ransfer any retail instalment sales contract, obtained by such dealer in connection with the sale by him in this state of motor vehicles manufactured or sold by such manufacturer, wholesaler or distributor, to a specified sales finance company or class of such companies, or to any other specified person, by any of the acts or means hereinafter set forth, namely:

1. By any statement, suggestion, promise or threat that such manufacturer, wholesaler or distributor will in any manner benefit or injure such dealer, whether such statement, suggestion, threat or promise is express or implied, or made directly or indirectly.

2. By any act that will benefit or injure such dealer.

3. By any contract, or any express or implied offer of contract, made directly or indirectly to such dealer, for handling such motor vehicles, on the condition that such dealer sell, assign or transfer his retail instalment contract thereon, in this state, to a specified sales finance company or class of such companies, or to any other specified person.

4. By any express or implied statement or representation, made directly or indirectly, that such dealer is un-

der any obligation whatsoever to sell, assign or transfer any of hs retail sales contracts, in this state, on motor vehicles manufactured or sold by such manufacturer, wholesaler or distributor to such sales finance company, or class of companies, or other specified person, because of any relationship or affiliation between such manufacturer, wholesaler or distributor and such finance company or companies or such specified person or persons.

(b) Any such statements, threats, promises, acts, contracts or offers of contracts, set forth in paragraph (a) of this subsection are declared unfair trade practices and unfair competition and against the policy of this state, are unlawful and are prohibited.

(c) No sales finance company, and no officer, agent or representative thereof, shall induce or coerce or attempt to induce or coerce any retail motor vehicle dealer to transfer to such sales finance company any of the retail instalment sales contracts in this state of such dealer on any motor vehicle by any of the following acts or means, namely:

1. By any statement or representation, express or implied, made directly or indirectly, that the manufacturer, wholesaler or distributor of such motor vehicles will grant such dealer a franchise to handle such motor vehicles if such dealer shall sell, assign or transfer all or part of such retail sales contracts to such sales finance company.

2. By any statement or representation, express or implied, made directly or indirectly, that the manufacturer, wholesaler or distributor of such motor vehicles will in any manner benefit or injure such dealer if such dealer shall or shall not sell, assign or transfer all or part of such retail sales contracts to such sale finance company.

3. By an express or implied statement or representa-

tion made directly or indirectly, that there is an express or implied obligation on the part of such dealer to so sell, assign or transfer all or part of such retail sales contracts on such motor vehicles to such sales finance company because of any relationship or affiliation between such sales finance company and the manufacturer, wholesaler or distributor of such motor vehicles.

(d) Any such statement or representations set forth in paragraph (c) of this subsection are declared to be unfair trade practices and unfair competition and against the policy of this state, are unlawful and are prohibited.

(e) Any retail motor vehicle dealer who, pursuant to any inducement, statement, promise or threat hereinbefore declared unlawful, shall sell, assign or transfer any or all of his retail instalment contracts shall not be guilty of any unlawful act and may be compelled to testify to each such act.

(f) No manufacturer shall directly or indirectly pay or give, or contract to pay or give, anything of service or value to any sales finance company licensee in this state, and no such licensee in this state shall accept or receive or contract or agree to accept or receive directly or indirectly any payment or service of value from any manufacturer, if the effect of the payment or giving of any such thing of service or value by the manufacturer, or the acceptance or receipt thereof by the sales finance company licensee, may be to lessen or eliminate competition or tend to grant an unfair trade advantage or create a monopoly in the licensee who accepts or receives the payment, thing or service of value or contracts or agrees to accept or receive the same.

(g) It shall be unlawful for any motor vehicle dealer or motor vehicle salesman to change the speedometer reading of any used vehicle offered for sale.

(h) It shall be unlawful for any motor vehicle dealer or motor vehicle salesman to refuse to furnish, upon request of a prospective purchaser, the name of the previous owner of any used car offered for sale.

(8) Penalties. Any person, firm or corporation violating any of the provisions of this section shall be deemed guilty of misdemeanor and upon conviction thereof shall be punished as follows:

1. For violation of any provision of subsection (7) of this section, by a fine of not exceeding ten thousand dollars or by imprisonment in the county jail for not to exceed one year or by both such fine and imprisonment.

2. For violation of subsection (2) of this section, by a fine not exceeding five hundred dollars or by imprisonment in the county jail for a period not to exceed ninety days, or by both such fine and imprisonment.

(9) Severability. If any provision of this section or the application thereof to any person or circumstance is held unconstitutional, the remainder of the section and the application of such provision to other persons or circumstances shall not be affected thereby. (1935 c. 474)

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1940 Number 396

ROBERT F. BUGGS,
Petitioner,

vs.

FORD MOTOR COMPANY, a Foreign Corporation,
Respondent.

PETITIONER'S REPLY BRIEF
in Support of Petition for Writ of Certiorari.

EDGAR B. TOLMAN, of Chicago, Ill.,
Attorney for Petitioner,
Robert F. Buggs.

JACOB GEFFS, of Janesville, Wis.,
Of Counsel.

INDEX, SUMMARY OF ARGUMENT and LIST OF AUTHORITIES CITED.

LIST OF AUTHORITIES CITED.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1940 **Number 396**

ROBERT F. BUGGS,
Petitioner,

vs.

FORD MOTOR COMPANY, a Foreign Corporation,
Respondent.

PETITIONER'S REPLY BRIEF
in Support of Petition for Writ of Certiorari.

I.

Reply to Respondent's "Statement of Case."

Under the above heading the respondent states as facts that the petitioner's "franchise" consisted merely of the Sales Agreement dated May 26, 1932 (R. pp. 41-46). Respondent further contends that that was one of the "undisputed" facts found by the District Court. From that premise the respondent argues that petitioner (plaintiff below) has no cause of action regardless of whether the decision of the Circuit Court of Appeals on the validity of the Sales Agreement is right or wrong.

It is not our purpose to argue the merits of this case. But we wish to point out briefly that respondent's premise is not warranted by the record.

The record clearly shows that this case was disposed of by the District Court on a motion for summary judgment. There were no evidence or "facts" presented to the trial court. True, there were affidavits but they dealt solely with the defendant's prayer for injunctional relief against plaintiff (petitioner) maintaining Ford signs. No appeal was taken from that part of the Judgment and Decree. On the question now on appeal—the right of the petitioner (plaintiff) to a jury trial for wrongful cancellation of his franchise—the record shows that all that the District Court had before it was the plaintiff's complaint, defendant's answer and plaintiff's reply. On these bare pleadings the court below made the elaborate "Findings of Fact, Conclusions of Law and Judgment and Decree," with which the respondent (defendant below) now seeks to foreclose this court from passing on the questions of law presented by the record.

In reply we wish to point out (1) that plaintiff assigned all such "Findings of Fact," "Conclusions of Law" and "Judgment and Decree" as error on appeal to the Circuit Court of Appeals (R. pp. 108-110). The record, therefore, speaks for itself and shows that these "undisputed facts" are disputed and (2) what interpretation should be given to the pleadings is a question of law. It is not the proper subject matter for "Findings of Fact."

To illustrate, the District Court found as "Facts:"

> "The agreement and not the statute controlled the rights of the parties. The statute has no application to said agreement. The defendant lawfully had the right to terminate the agreement, at will and without cause, and lawfully terminated the same, and no cause of action for damages arises in favor

of the plaintiff by reason of such termination, either under said agreement or said statute or otherwise. *The statute does not create a cause of action for damages for any alleged violation thereof''* (italics ours) (R. p. 100).

Obviously, all such matters are questions of law. Whether the statute controls the rights of the parties, or the defendant may as a matter of right terminate the relations of the parties without cause, or whether violation of the statute creates a cause of action for damages or not are questions of law.

In fact the District Court promptly contradicted itself because under ''Conclusions of Law,'' we find:

''9. By terminating the said agreement the defendant did not violate the said statute.

10. The said statute creates no cause of action for damages for any violation thereof'' (R. p. 103).

In *National Surety Corporation of New York vs. Ellison,* 88 F. (2d) 399, at page 402 the Court states:

''It is true, of course, that a summary judgment on the pleadings is precluded where an issue of fact is raised, * * * *and that the judgment must be sustained by undisputed facts appearing in the pleadings''* (italics ours).

From this analysis it is apparent that the so-called ''undisputed facts'' are quetsions of law for this Court to decide if the case is heard on its merits.

The respondent contends, in effect, that the relations between the parties is confined solely to the ''Sales Agreement'' of May 26, 1932. This contention appears to be based on a quibble over the word ''franchise'' and an allegation in paragraph 4 of plaintiff's complaint: ''the last said franchise held by this plaintiff bears date May

26, 1932." The respondent would, therefore, have the Court to ignore paragraphs five to twenty-two inclusive of the complaint (R. pp. 13-17). Regardless of what nomenclature is used, the complaint in substance describes the relations of the parties over a period of twenty-five years, the efforts, time and cost to the plaintiff in building up the business in Rock County, Wisconsin. Paragraph 14 (R. p. 15) alleges that plaintiff had invested the sum of One Hundred Thousand Dollars ($100,000.00) at the defendant's insistence and request in building up, promoting and maintaining the business. The complaint in substance alleges that it was this business which was destroyed by the defendant's wrongful and malicious violation of the Statute (Sec. 218.01 Wisconsin Statutes). Under a fair and liberal interpretation of the complaint, it is apparent that the allegations are not confined to just one transaction between the parties. This action was commenced in the Circuit Court of Rock County, Wisconsin, and the complaint is therefore entitled to be interpreted according to the laws of Wisconsin. Section 263.27 Wisconsin Statutes reads:

> "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed, with a view to substantial justice between the parties."

Rule 8 (f) of the Federal Rules of Civil Procedure reads:

> "All pleadings shall be so construed as to do substantial justice."

In paragraph 5 of his reply (R. p. 50) the plaintiff alleged:

> "5. The plaintiff denies that pursuant to the purported sales agreement of May 26, 1932, that he held himself out as an authorized Ford dealer, but alleges that on the contrary that he has been possessed of

a franchise as an authorized Ford dealer and an authorized Ford Service Station ever since the 13th day of October, 1913, in the manner and form in which he has alleged in paragraphs 4 to 14 inclusive of his complaint on file in this cause which allegations he incorporates in his reply by reference as if fully stated herein. * * *'' (R. p. 50).

Furthermore respondent's answer (R. p. 47) shows three written agreements with petitioner subsequent to May 26, 1932; namely, December 12, 1935, May 1, 1937 and October 20, 1936. The fallacy in respondent's contention is that it assumes that petitioner is suing for breach of the Sales Agreement. Such is not the case. Petitioner is suing in tort for violation of the Statute. We submit that petitioner's cause of action is not confined to the matters contained in the Sales Agreement of May 26, 1932.

II.

Reply to Respondent's contention that case at bar is not in conflict with the decision of the Circuit Court of Appeals for Fourth Circuit, in the case of Ford Motor Company vs. Kirkmyer Motor Company, 65 Fed. (2d) 1001.

Counsel argues that the written agreement involved in the *Kirkmyer* case is distinguishable from the Sales Agreement in the case at bar. When the case at bar was before the Circuit Court of Appeals for the Seventh Circuit, respondent stated on page 19 of its brief:

> "In *Ford Motor Company vs. Kirkmyer Motor Co.*, 65 Fed. 1001, the court says with reference to a Ford Dealer's contract, apparently similar to the one in question, * * *''

and on page 10, respondent stated:

> "The contract (Sales Agreement) was a binding contract; * * * *Ford Motor Co. vs. Kirkmyer Motor Co.*, 65 Fed. (2d) 1001;''

III.

Reply to Respondent's Argument that the Sales Agreement of May 26, 1932 (R. pp. 41-46), is a valid contract.

On pages 8-10 of its brief respondent contends that the Sales Agreement contained mutuality because the petitioner was given the right to hold himself out as a Ford dealer and display Ford signs.

A careful reading of the Sales Agreement (R. pp. 41-46) will demonstrate that no such rights were conferred on the petitioner by that document.

IV.

Other Matters Involved.

In reply to respondent's argument pages 11-14 of its brief that the decision below is not in conflict with local law or local decisions, we are content with the argument submitted in our principal brief.

As to respondent's argument on page 10 of its brief that petitioner has no cause of action for damages, it is our understanding of the rules that this is not the proper place nor time for the argument of such matters.

Likewise as to respondent's argument on page 15 of its brief as to the constitutionality of the Wisconsin Statute, we deem it unnecessary to argue that matter at this time.

For the above reasons, the writ of certiorari prayed for should be granted.

Respectfully submitted,

EDGAR B. TOLMAN,
Attorney for Robert F. Buggs, the Petitioner.

JACOB GEFFS,
Of Counsel.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 396

ROBERT F. BUGGS, *Petitioner,*

vs.

FORD MOTOR COMPANY, a Foreign Corporation,

Respondent.

BRIEF OF RESPONDENT

Opposing Granting of Writ of Certiorari.

CARL MUSKAT,
773 North Broadway,
Milwaukee, Wisconsin.

CLIFFORD B. LONGLEY,
WALLACE R. MIDDLETON,
1400 Buhl Building,
Detroit, Michigan.

Attorneys for Respondent,
Ford Motor Company.

Index, Summary of Argument and List of Authorities Cited.

Summary of Argument—*Continued.*

List of Authorities Cited.

List of Authorities Cited—*Continued.*

Statutes.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 396

ROBERT F. BUGGS, *Petitioner,*

vs.

FORD MOTOR COMPANY, a Foreign Corporation,

Respondent.

BRIEF OF RESPONDENT

Opposing Granting of Writ of Certiorari.

I.

Opinion of the Court Below.

The opinion in the Circuit Court of Appeals (R. 120-125) is reported in *113 Fed. Rep. (2d) 618.*

II.

Jurisdiction.

Respondent opposes the granting of the writ of certiorari on the ground that there are no special and important reasons set forth therefor, under Supreme Court Rule 38-5.

III.

Statement of Case.

The following additional statement is deemed necessary for the correction of inaccuracies and omissions in petitioner's statement.

The gist of petitioner's (plaintiff below) complaint is an alleged violation of a *written* "franchise" dated May 26, 1932 (R. 12-16). It is undisputed and the district court found (R. 99-104) that the only written agreement between the parties dated May 26, 1932 is the sales agreement in question (Exhibit A attached to defendant's pleadings R. 41-46). Petitioner did not aver any other "franchise" but did aver that cancellation of his "franchise" was in violation of paragraphs 15, 16 and 17 of sub-section (3) (a) of Section 218.01 of the Wisconsin Statutes of 1937 quoted in full on pages 19-35 of petitioner's brief and asked damages for alleged violation of the claimed "franchise" and the statute (R. 12-16). Accordingly, petitioner is necessarily relying on the very written document he claims is void.

Respondent (defendant below) avers (R. 17-39) that this sales agreement of May 26, 1932 (R. 41-46) was valid and exclusively controls the rights and obligations of the parties, was terminable at the will of either party without cause, and was in fact terminated pursuant to notice (Exhibit B, R. 47) and that the statute has no application. Respondent claims that termination of said agreement pursuant to its terms did not create any cause of action for damages in the petitioner either under the agreement or the statute and further that the statute is unconstitutional and in violaion of the Wisconsin and United States Constitutions (R. 22-23-25). The agreement of May 26, 1932, authorized petitioner to maintain "Ford" signs and required him to remove those signs on termination of the contract. Petitioner failed to remove the signs on termina-

tion of the sales agreement (R. 63-81, 87-91) and respondent in its pleadings included an equitable defense and counterclaim wherein it sought a mandatory injunction to compel petitioner to remove said signs (R. 25-39).

Respondent filed a motion for summary judgment (R. 55-91), in opposition to which petitioner filed affidavits (R. 93-97). On the hearing on this motion for summary judgment, petitioner consented to the injunction (R. 98) and the court made findings of undisputed facts and conclusions of law (R. 99-104) upon which the judgment was based dismissing the complaint of the petitioner on the merits and issued an injunction as prayed for by respondent (R. 105-107).

By the terms of the sales agreement of May 26, 1932 (R. 41-46) petitioner was required to maintain a place of business suitably located and equipped as sales room and service station and acceptable to Company; to conspicuously display effective signs; to carry an adequate stock of genuine Ford parts; to install and maintain tools and machinery in said service station as recommended by Company; to employ competent salesmen; and to make repairs in a workmanlike manner on products of the Company whether sold by the dealer or not. In return, Company agreed to sell to petitioner Company products and gave petitioner the right during the period said contract was in operation to hold himself out as an authorized Ford dealer and to display Ford signs (see paragraph 7 (a) and (g) of sales agreement, R. 42, 44).

The District Court found that the "franchise" upon which petitioner relied was said sales agreement of May 26, 1932 (R. 41-46), that the statute was enacted long after the sales agreement was made and therefore found that the statute had no application to this case, and dismissed the petitioner's action without passing on the constitutional questions raised by respondent (R. 98-107). The Circuit

Court of Appeals affirmed the judgment of the District Court and likewise made no decision respecting the constitutionality of the Wisconsin Statute (R. 120-126, 113 Fed. (2d) 618-621).

Petitioner's brief contains inaccurate statements of fact and ambiguous language that may be misleading:

(a) It is not denied that the effective date of the provisions of the statute relied upon by petitioner was July 14, 1937 and that the date of cancellation of petitioner's sales agreement by respondent was September 27, 1937, but it is also undisputed that the date of the sales agreement, May 26, 1932, was long before the statute became effective. Both the District Court and the Circuit Court of Appeals held that the statute had no application to this agreement because it was enacted after the agreement was made. Therefore, the statements on page 6 of petitioner's brief that "The statute * * * was applicable to the parties at the time petitioner's cause of action arose, * * * (is) admitted on the record," and on page 7 of petitioner's brief that "This statute was applicable to both parties *at the time of the alleged wrongful act,*" are inaccurate.

(b) The opinion of the Circuit Court of Appeals says (R. 122, 113 Fed. (2d) 619):

"The legal questions are:

"1. Is the Wisconsin statute (Wis. Stats. 218.01 (3) (a) 17) valid? Is it retroactive?

"2. Is one aggrieved by the inexcusable cancellation of his dealer's contract entitled to maintain an action for damages because of this statute which provides for cancellation of the manufacturer's right to do business in the State of Wisconsin in case it inexcusably and unjustifiably cancels a dealer's agreement?

"3. Was the last written agreement between plaintiff and defendant invalid because unilateral?

"4. If invalid, were there valid contractual obligations binding on the parties on September 22, 1937, which made applicable the aforesaid Wisconsin statute?"

The Circuit Court of Appeals only decided that the sales agreement was a valid contract and that the statute was not retroactive and left the other questions undecided. Hence the allegation on pages 6 and 7 of petitioner's brief that the court below did not question a statutory duty by respondent is inaccurate.

IV.

Argument.

A — The decision of the Circuit Court of Appeals for the Seventh Circuit in this case is not in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit, in the case of Ford Motor Company vs. Kirkmyer Motor Company, 65 Fed. (2d) 1001.

The decision of the Circuit Court of Appeals for the Seventh Circuit in this case holds, "We are convinced that the agreement before us is not unilateral and is valid (R. 123, 113 Fed. (2d) 619).

There is nothing in the record or in published opinions from which it can be determined that the contract in the case at bar is identical with the written contract mentioned in the *Kirkmyer* case. The quotations of some particular paragraphs of that contract while similar to corresponding paragraphs in respondent's sales agreement (R. 41-46) are somewhat at variance and do not purport to state the entire contract and hence indicate that the contracts are on different forms.

However, the *Kirkmyer* case is based upon an alleged "*verbal*" contract. In the *Kirkmyer* case, Kirkmyer was

a Ford dealer in Richmond who alleged that he was induced to his damage to move to "South Richmond" on a *"verbal"* promise by an agent of Ford Motor Company to award Kirkmyer a dealership in the "West End" in case Ford Motor Company appointed an additional dealer there. Kirkmyer was not granted the additional dealership created in the "West End." Kirkmyer operated in "South Richmond" under a sales agreement negotiated simultaneously with or subsequent to the alleged verbal agreement. The real decision in the *Kirkmyer* case was that the alleged verbal agreement was lacking in mutuality and entirely too indefinite to form the basis of a binding obligation. In that decision the court said, 65 Fed. (2d) 1003:

> "To say that the parties contemplated that plaintiff should be given a contract of the character that defendant was making with other dealers in 1930, such as it entered into with plaintiff in South Richmond or with Womble Motor Company for the West End, does not help plaintiff's position; for this written contract does not obligate defendant to deliver a single car or truck and *may be terminated at any time at the will of either party.* It merely furnishes a basis upon which dealings are to be conducted; and *while it is a binding contract to the extent that it is performed in that it attaches to and becomes a part of transactions entered into so long as it remains uncancelled * * * and imposes certain obligations as to how dealings shall be conducted,* it imposes no obligation on defendant to sell or on the dealer to buy and furnishes no basis for recovery of damages if defendant refuses to sell" (italics ours).

The *Kirymyer* case refers to the sales agreement therein mentioned as a "franchise." It appears from the above quotation that the court did not say that the contract was void but said that it became a part of the transactions between the parties so long as it remained uncancelled. The statement in the *Kirkmyer* case is essentially not that the written sales agreement was void but that if a verbal con-

tract had been made to enter into such a sales agreement, it was entirely too indefinite to form the basis of a binding obligation, as the sales agreement could, after execution, be terminated by either party at will.

Petitioner has an inconsistent position in this case. He claims to have held a written franchise (R. 13). He can show no other written document than the sales agreement of May 26, 1932. He claims that the decision in the *Kirkmyer* case is at divergence with the decision of the case at bar. The *Kirkmyer* case refers to a written sales agreement as a franchise. So petitioner is arguing on the authority of the *Kirkmyer* case that his franchise is void (Petitioner's Brief page 8) and a nullity (Petitioner's Brief page 7) which could not possibly help him to recover damages for cancelling it.

The *Kirkmyer* case states that the relationships of the parties under the written sales agreements are governed by the terms of that sales agreement and that those relationships may be terminated at will by cancelling the contract in accordance with its terms without liability. Therefore, so far as the issue involved in the case at bar is concerned, the decision of the Circuit Court of Appeals for the Seventh Circuit is not in divergence with the decision of the Circuit Court of Appeals for the Fourth Circuit in the *Kirkmyer* case.

The court below did not admit that there was a divergence of opinion between the *Kirkmyer* case and this case as claimed by petitioner on page 7 of his brief. The court says (R. 122, 113 Fed. (2d) 619):

> "The case which most strongly supports plaintiff's position is Ford Motor Company vs. Kirkmyer, 65 Fed. (2nd) 1001, a decision by the Circuit Court of Appeals of the Fourth Circuit."

However, the court also says (R. 123):

> "Such disagreement as seemingly exists in the decisions may be partly attributed to the differences in the terms of the agreements under attack."

B — The sales agreement of May 26, 1932 (R. 41-46) involved in this case is a perfectly valid contract between the parties containing a provision for its termination and was properly terminated in accordance with that termination clause and hence the decision of the Circuit Court of Appeals for the Seventh Circuit in this case is clearly correct.

"The purchase of an automobile is not like the purchase of a sack of potatoes" (see *Ford Motor Company vs. Boone*, 244 Fed. 335, 338). Since in order to maintain its business and good will, a manufacturer must provide means for repair and servicing of its products, the only practicable method of fulfilling this necessity is to maintain a dealership organization, the duties of which are defined by contract between the manufacturer and such dealers. The contract in question (R. 41-46) provides for the sale of Ford products to petitioner for resale. As it is a continuing contract it does not recite the exact price of the goods to be sold, but instead provides for sale at list prices or at such discount from published prices as is from time to time fixed by the company, and as stated by the Circuit Court of Appeals, "These net list prices and published list prices were the same to all dealers," and the Circuit Court of Appeals held that it lawfully "provided a method whereby the price could be definitely ascertained at any time" (R. 125, 113 Fed. (2d) 620; and see cases cited in the Opinion).

This contract is a basic contract which sets up the conditions under which the parties will operate. In return for establishing one place of business equipped, manned and displaying effective signs in a manner acceptable to Com-

pany to sell and service Ford products, the dealer gets the privilege of holding himself out as a Ford dealer, of displaying the Ford signs and of trading on the Ford name so long as the contract remains in effect and no longer.

This is admittedly a right of some value to the dealer. If it were not so, there would be absolutely no point to the petitioner's claim for damages for terminating that right. Petitioner's entire claim goes to a claimed right to have the dealer relationship as provided by the sales agreement (R. 41-46). It therefore seems perfectly clear that in entering into the sales agreement Buggs not only agreed to maintain certain facilities and conduct his business in a certain way but also there moved from Ford Motor Company to him a consideration of value, to-wit, the right to display the Ford signs over his place of business and to hold himself out as an authorized Ford dealer. Such being the case, there was ample consideration on both sides of the contract and hence there was mutuality and the contract was perfectly valid. It seems rather stange that someone who claims that the right to be a Ford dealer is no consideration to him and therefore his contract is void, should be suing the other party to such a contract for $150,000.00 in damages for the termination of his right to be a Ford dealer.

See also argument under subdivision (D) following, and decision of Circuit Court of Appeals herein setting forth its reasons why the contract is valid (R. 123-125, 113 Fed. (2d) 619, 620).

In the case of *Ford Motor Company vs. Alexander Motor Company,* 223 Ky. 16, 2 S. W. (2d) 1031, the court said:

> "It is a well-settled rule of law that a right to cancel a contract, incorporated or reserved therein, is a part of the contract itself, and, upon the exercise of such contractual right, all obligations under the contract cease and determine, and no liability arises from the cancellation. Louisville Tobacco Warehouse Co. vs. Ziegler, 196 Ky. 414, 244 S. W. 899.

"Parties may lawfully enter into agreements like the one here involved, and the courts enforce them as written. If parties agree that the rights, duties, and obligations arising from a contractual relation shall endure only at the will or pleasure of either, the courts have no right to substitute a different duration for such rights. Executory contracts, terminable at will, insofar as they are unexecuted at the time of termination, afford no basis for a cause of action to either party. Rehmzeiher Co. vs. Walker Co., 156 Ky. 6, 160 S. W. 777, 49 L. R. A. (N. S.) 694; Paragon Oil Co. vs. Hughes, 193 Ky. 534, 236 S. W. 963; Daniel Boone Coal Co. vs. Miller, 186 Ky. 561, 217 S. W. 666; Soaper vs. King, 167 Ky. 126, 180 S. W. 46; Ross-Vaughn Tobacco Co. vs. Johnson, 182 Ky. 325, 206 S. W. 487; Goff vs. Saxon, 175 Ky. 330, 192 S. W. 24.

"*Such contracts are binding on both parties, until the right of cancellation is exercised by one or the other.* Guffey vs. Smith, 237 U. S. 101, 35 S. Ct. 526, 59 L. Ed. 856" (italics ours).

C — If the contract lacks mutuality, petitioner likewise has no cause of action for damages.

The court found that there was a valid contract, and as we have pointed out the same is a valid contract, and there are no decisions holding that this form of contract is invalid, yet if the Court deem it one without mutuality, as claimed by the petitioner, he likewise has no cause of action for damages, and the court's decision is still correct.

E. I. DuPont de Nemours & Co. vs. Claiborne-Reno, 64 Fed. (2d) 224;

Huffman vs. Paige-Detroit Motor Car Co., 262 Fed. 116;

Ford Motor Company vs. Kirkmyer Motor Company, 65 Fed. (2d) 1001, 1006 (cited by petitioner);

Motor Car Supply Co. vs. General Household Utilities Co., 80 Fed. (2d) 167 (cited by petitioner).

D — The decision is not in conflict with local law or local decisions.

Petitioner's claim that the decision is in conflict with local law seems to be based upon the provision of the sales agreement declaring it to be a Michigan contract governed by the laws of Michigan and a claim that the decision is in conflict with Michigan decisions, citing two Michigan cases (petitioner's brief, pp. 13 and 14). Petition also cites certain cases which petitioner claims show that the decision repudiates the established law of contracts (petitioner's brief, pp. 14 to 17).

The fact that the contract (R. 41-46) contemplates the establishment, equipment according to certain standards, and maintenance of a place of business for the rendering of repair service to any Ford automobiles in that place of business and the obvious grant of a right to the petitioner to hold himself out as a Ford dealer and display Ford signs, completely nullifies all of that argument of the petitioner.

That argument is based upon the erroneous premise that the sales agreement involves nothing but merely an agreement to buy and sell automobiles at an indefinite price to be later determined. The Circuit Court of Appeals, in finding that this is not a correct construction of the contract, said:

> "Vital and determinative are paragraphs 1 and 2. The first obligates defendant to sell, but upon 'terms, conditions and provisions hereinafter specifically set forth.' These conditions and terms are set forth in paragraph 2, which provides defendant 'will sell its products to plaintiff f. o. b. Detroit, Michigan at such net list price, or at such discounts from published list prices as are from time to time fixed by Company.' This seems, under the authorities and on reason, sufficiently definite.
>
> "The parties had been dealing with each other prior to the execution of the last contract. They knew of the practices of each other. The dealer

knew that automobiles were redesigned and new models appeared yearly and as a result prices changed at least seasonally. Defendant's business was nationwide and its agents were many. It was to this known situation that the contract referred. The parties negotiated with a background of past dealings and mutual knowledge of the practices of the trade. 'The net list prices and discounts from published list prices' appearing in paragraph 2 were well known to both parties. These net list prices and published list prices were the same to all dealers. They changed as necessity required. They were not lacking in definiteness, but provided a method whereby the prices could be definitely ascertained at any time'"[2] (R. 124-125, 113 Fed. 2d 620).

The Michigan Uniform Sales Act enacted in 1913 contains the following clause:

> "Definition and Ascertainment of Price * * *. The price may be fixed by the contract, or may be left to be fixed in such manner as may be agreed, or it may be determined by the course of dealings between the parties." C. L. 1929 Sec. 9448.

The Wisconsin Act is identical and is found in Sec. 121.09 (1) Statutes of 1931. The sales agreement provided:

> "(2) Company will sell its products to Dealer f. o. b. Detroit, Michigan, at such net list price, or at such discounts from published list prices as are from time to time fixed by Company * * *" (R. 41).

It thus follows under both the Michigan statutes and the Wisconsin statutes that the sales agreement of May 26,

---

"[2]

Ken-Rad Corp. vs. R. C. Bohannan, Inc., 6 Cir., 80 F. 2d 251;

Memphis Furniture Mfg. Co. vs. Wemyss Co., 6 Cir., 2 F. 2d 428;

Moore vs. Shell Oil Co., 139 Or. 72, 6 P. 2d 216;

Moon Motor Car Co. vs. Moon Motor Car, Inc., 2 Cir., 29 F. 2d 3."

1932 (R. 41-46) meets the requirements of the Uniform Sales Act. The argument of petitioner with reference to *Wardell vs. Williams,* 62 Mich. 50; and *Bastian vs. J. H. DuPrey Company,* 261 Mich. 94, is based upon a theory that the sales agreement involves absolutely nothing but a sale of automobiles at an indefinite price. This is not true and hence the argument is not in point. In the *DuPrey* case, upon which petitioner relies, the Supreme Court of Michigan holds that a contract to buy cucumbers to be grown and delivered during the 1931 season was not void for want of mutuality, and therefore that case is authority for the respondent's claim that the contract (R. 41-46) in question was good rather than petitioner's claim that it was void under the Michigan law. Also, the *Wardell* case is no authority on petitioner's point, as the contract was held void under the Statute of Frauds, and also because something was left to be negotiated before a contract was intended.

The other decisions cited in petitioner's brief not specifically referred to herein, do not relate to matters of local law or local decisions, and hence are not applicable under *Erie R. Company vs. Tompkins,* 304 U. S. 64, and the last rules of this court. Therefore the petitioner's reasons set forth under "C" in his petition, page 4, and under "3," pages 6 and 14 to 17 of his brief, have no application.

The cases cited by petitioner at the bottom of page 6 and at the top of page 7 of his brief, and claimed to be in support of his contention that the statute creates a cause of action for money damages, have no application because that is one of the questions that the Circuit Court of Appeals herein did not consider, as we have heretofore pointed out. Therefore, it is unnecessary to present an argument at this time on this question. However, we will briefly state why petitioner's claim is incorrect. The statute in question here relates merely to the granting of licenses and

provides under what circumstances licenses may be denied, suspended or revoked, which is an exclusive remedy granted the banking commission; (however, a remedy that cannot be applied against respondent for reasons presented herein, and other reasons that need not be discussed here because no question of revocation of licenses is involved). There is no legislative intent to create a cause of action for damages for any alleged violation. There is no criminal penalty provided for its violation. Petitioner has misconceived the principles of law applicable. The following cases clearly establish that this automobile licensing statute does not create a cause of action for damages.

Progressive Miners of America Local Union No. 109 vs. Peabody Coal Co., 7 Fed. Supp. 340 (District Ct. E. D. Illinois, May 7, 1934) affirmed 75 Fed. (2d) 460, (C. C. A. 7th Circuit) February 6, 1935;

Globe Newspaper Co. vs. George H. Walker, 210 U. S. 356, 52 L. Ed. 1096, 38 Sup. Ct. R. 726, June 1, 1908;

Decorative Stone Co. vs. Building Trades Council of Westchester County, 23 Fed. (2d) 426 (C. C. A. 2nd Circuit) affirming decree, 18 Fed. (2d) 333, certiorari denied 48 S. Ct. 530, 277 U. S. 592, 72 L. Ed. 1005;

Almy vs. Harris, 5 Johns. (N. Y.) 175;

Griswold vs. Camp. 149 Wis. 399;

State ex rel. Waldorf vs. Hill, 217 Wis. 59.

E — Should the Court be of the opinion that the Wisconsin Statute, if valid, governs this case, then a decision of the case would necessarily involve the questions raised on the record as to the validity of the Wisconsin Statute and as to the rights conferred by that statute.

The District Court and the Circuit Court of Appeals found it unnecessary to decide these questions because those courts found that the statute was not intended to have retroactive effect on contracts made before it was enacted and the sales agreement in question was a valid contract between the parties terminated in accordance with its terms. This enabled those courts to enter a judgment in favor of the respondent without deciding the other questions involved in the case. But any decision in favor of the petitioner would necessarily have involved the determination of the other questions presented on the record as petitioner's claim seems to be based on the statute in question while respondent in its pleadings and before the District Court and the Circuit Court of Appeals has claimed both that the statute in question does not give rise to a civil cause of action by an automobile dealer like the petitioner under any circumstances and has also likewise asserted that the statute in question is a violation of the constitutions of the State of Wisconsin and of the United States (R. 22, 23, 25, 104, 122, 113, Fed. (2d) 619). Respondent asserted that such statute is unconstitutional on the ground it would impair the obligation of contracts, violate the due process clause and unconstitutionally delegate legislative power to the banking commission and also violate the commerce clause of the Federal Constitution, and would deny this respondent the equal protection of the laws. We are not presenting our argument on the question of the constitutionality of this statute in this brief because both courts below did not decide this question for the reason that they found it unnecessary to do so in the disposition that was

made of the case. The Circuit Court of Appeals in its opinion expressly stated:

> "Having reached the conclusion that the agreement was valid and binding and therefore subject to cancellation by either party upon the giving of written notice, the only remaining question is the effect of the Wisconsin statute upon such an existing contract."
>
> "We are convinced that the legislature did not intend to make its legislation, nor did the legislation, by its own terms, apply to and include existing contracts. *We must give to it a construction which will avoid a successful attack on its unconstitutionality*" (italics ours) (R. 125, 113 Fed. (2d) 621).

For the above reasons, the writ of certiorari prayed for should be denied.

Respectfully submitted,

CARL MUSKAT, of Milwaukee, Wisconsin,
(773 North Broadway)
CLIFFORD B. LONGLEY,
WALLACE R. MIDDLETON, of Detroit, Michigan,
(1400 Buhl Building)
Attorneys for Respondent Ford Motor Company.

Appendix.

Paragraphs 15, 16 and 17 of Subsection (3) (a) of Section 218.01 of the Wisconsin Statutes of 1937, were created by Chapter 378 of the Laws of 1937, effective July 14, 1937. Reference to the above Chapter 378 of the Laws of 1937 is omitted from the Appendix in petitioner's brief and should be added at the end of page 35 of petitioner's brief.